Welcome to our April Keeping In Touch Newsletter

We are living in very unusual times. We are in a unique situation. Our Employment Legislation is not designed to deal with a pandemic.

Over the next number of months and probably the next year or two, the law as we know it relating to the issue of Unfair Dismissal, Redundancy, Lay-Off, Short Time Working, Salary Reductions are just some of the issues which are going to go through the courts. They will start in the WRC, they will go to the Labour Court and some will go to the High Court.

Of course, Employment Legislation could not reasonably be expected to look at an issue of pandemic. Therefore, the legislation is particularly unsuited to deal with a lot of claims.

At the same time, we would anticipate maybe not immediately but certainly in the next twelve months that companies will be coming insolvent unless there is massive injections of monies into businesses, whether large and particularly into the SME's sector. This happened in the time 2008 to 2011 in particular when we had the last recession. Hopefully, that will not happen again that businesses fail.

There are going to be stresses on the WRC and the Labour Court. They will require resources. The WRC building does not have WIFI. It will need it immediately. We will have to be looking at remote hearings. While that would be a difficulty in relation to Unfair Dismissal and Equality cases, other claims such as for example the Organisation of Working Time Act, claims under the Fixed Term Work Act, claims under the Terms of Employment (Information) Act and a myriad of other Acts are ones which invariably are determined on factors which invariably do not require evidence. Where evidence is required it is often of a very limited nature. There is every reason going forward now that we are going to have to see hearings been heard online. At a very minimum in relation to cases issues such as legal submissions, even if they are not going to be heard online, should be able to be dealt with as a preliminary matter with an Adjudication Officer then deciding what evidence they need to hear. For example, in an Unfair Dismissal case, the first issue is always whether fair procedures were applied. This would be a matter of fact

more than opinion from either the employee or the employer concerned. There is no reason why an Adjudication Officer cannot deal with that either on a preliminary hearing with just the legal representative present or on a remote working system such as ZOOM, for some others procedures. If an Adjudication Officer then believes that it is appropriate that witnesses are called, then so it is. There will be a change in how business operate. There will be challenges for business in structuring matters in such way that individuals can work from home. There will also be opportunities for businesses to do so.

Richard Grogan appointed and accredited Mediator
In March 2020 Richard Grogan attended CEDR Mediator Training Course. Richard successfully completed same and is now a CEDR Accredited Mediator. As a firm going forward, we will be providing these services.

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Out and About in March 2020

On 1st March Richard Grogan was interviewed for the journal.ie on a question and answer article about the Employment Law issues concerning Covid-19.

On 2nd March Richard Grogan was interviewed by Ingrid Miley for the 6 o'clock news concerning the Employment Law issues for employers and employees around the Corona Virus.

Also on 2nd March Richard Grogan was interviewed by Ken O'Neil of the Irish Examiner about Covid-19 giving practical advice on the Employment Law issues for employers and employees.

On 2nd March Richard Grogan was quoted in an article by Ingrid Miley on RTE on the Employment Law issues around Covid-19 issue entitles Covid-19 carrying financial implications for workers.

On 3rd March Richard Grogan was interviewed on the Sean Moncrieff show on NewsTalk FM on Employment Law issues.

On 3rd March Richard was interviewed for a podcast for the Journal.ie answering readers questions around Employment Law rights surrounding the Corona virus.

On 4th March Michelle Loughnane was interviewed on East coast FM with David Harvey on the Morning Show talking about Employment Law rights and obligations concerning Covid-19.

On 5th March Richard was interviewed on Ireland AM.

On Saturday 6th March the Journal.ie issued a podcast called "Covid-19-An Employment Law specialist explains issues around sick leave and working remotely" where Richard Grogan of this firm was interviewed for the podcast.

Richard Grogan was quoted in the journal.ie on the new income support plan introduced by the Government as part of Covid-19.

On 16 March Richard Grogan was quoted in the Irish Examiner on the issue of lay-off arising due to Covid-19.

On 18th March Michelle Loughnane was with Declan Meehan on the Morning Show with East Cost FM on Wednesday 16th March discussing employee rights in relation to Covis-19 issues.

On 26 March Richard Grogan wrote an article for Irish Legal News on the Temporary Wage Subsidy Scheme proposed in the Public Interest (Covid-19) Bill, 2020.

On the same day Richard Grogan was on the Sean O Rourke Show discussing the Temporary Wage Subsidy Scheme and that evening on Newstalk FM with Ivan Yates. Richard Grogan had been contacted to provide them with detailed outlines relating to the Bill which were discussed at length on his show.

On 27 March Richard Grogan was quoted in the Independent about doubts raised over the Covis-19 Wage Subsidy Scheme.

In the Seanad debates on the Public Interest (Covid-19) Bill 2020, Richard Grogan was referred to as "an eminent employment law specialist", in a question raised by Senator Michelle Mulherrin on the Temporary Wage Subsidy Scheme.

Financial loss in Unfair Dismissal cases

This issue arose in ADJ-00024148.

The issue arose whether the economic loss of the employee, which is the basis under which an Unfair Dismissal award can be made, would cease when they obtained new employment.

The Adjudication Officer referred to the case of Courtaulds Northern Spinning Limited – v- Moosa 1994 IRLR43 which held:

"… It is clear that the new employment has endured long enough to protected by the Unfair Dismissal legislation, the Industrial Tribunal should treat the loss following from the original dismissal as coming to an end at the start of the employment."

The Adjudication Officer pointed out that this case was applied by the EAT in Susan O'Keefe and WYG Engineering Limited 2013 24ILR279 when it stated ins decision:

"It seems to the Tribunal that this is a useful guide considering the permanence of further employment."

The Courtaulds case was also considered in the case of Deputy General Manager and a Hotel ADJ00017826 where temporary employment was obtained where it was said:

"In the herein case, the further employment was not permanent in nature. While the amount of earnings from it should be considered in mitigation of loss, it did not stop loss rising from the Unfair Dismissal." This is useful restatement of the law by the Adjudication Officer.

Unfair Dismissal-Resignation

An interesting issue arose in case UDD2017 being a case of G Holand Ltd and Laura Dennison. In this case the Court set out that Section 1 of the Act, being the Unfair Dismissals Act envisages two circumstances in which a resignation may be considered a Constructive Dismissal. The Court pointed out that this arises where the conduct of the employer amounts to a repudiatory breach of the contract of employment and in such circumstances the employee would be entitled to resign his or her position often referred to as the contract test. This requires that an employer be guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to himself or herself as discharged from any further performance. The Court pointed out that this was held in the case of Western Excavating (ECC) Limited -V- Sharpe 1978 IRL332. The Court also pointed out that secondly there is an additional reasonableness test which may be relied upon either as alternative to the contract test of in combination to that test. This test asks whether the employer conducted his or her affairs in relation to the employee so unreasonably that the employee cannot be expected to put up with it any longer. If so the Court pointed out the employee is justified in leaving. In this case the Court found that issues were raised and presented to the company at a meeting and were accompanied by a

verbal resignation. The Court held that this amounted to a very serious complaints of a grievance made to the managing director/owner of the company by a senior manager direct report. The Court pointed out that from that point the employer was on full notice of the very serious complaint but chose to ignore the complaint and act on the resignation.

The Court referred to the case of the Employment Appeals Tribunal which found that for a resignation to be valid it must be voluntary and not brought about under duress otherwise it will be construed as a dismissal by the employer. In this regard the Court referred to the case of Flood -V- Regency Fair Limited UD1036/1988 and the following extract

''The Tribunal is satisfied that the resignation of the claimant was not voluntary and was induced directly by the respondent either by the threat or ultimatum as recalled by the claimant or by the reply of Mr O'Sullivan when asked if she should resign, that her resignation would be best in the circumstances. We determine that she was dismissed from her employment with the respondent''

The Court also referred to the case of an employee and an employer UD2116/2011 which involved a resignation drafted by an employer and given to an employee in a car park for signing with the employee did under threat of dismissal. Applying the Supreme Court judgment in Hurley -V- Royal Yacht Club 1977 E.L.R.225 The Supreme Court considered that issues surrounding the enforceability on severance agreements and held that they must be 'informed consent by the employee to contract out of his rights'.
The Court pointed out that in applying the Supreme Court dicta the Tribunal went on to say

'' If an employer prepares a letter of resignation it is important that the employee is signing it voluntarily and that he/she know and fully understands what he/she is doing. In the Hurley case the Court also stated that an employee contracting out of his or her rights to take a claim should be advised of his/her entitlement under the relevant employment legislation. The employee should be advised in writing by the employer that he/she should take appropriate advice in relation to the severance agreement and as to his/her rights generally, and that there must be informed consent. While the Tribunal accepts that the

claimant did not sign a severance agreement the claimant by signing the letter of resignation, effectively relinquished her employment rights''

While the Court pointed out that these cases did not relate precisely to the same circumstances at issue in this case nonetheless they illustrate a point.

In this case the Adjudication Officer awarded €15,000. The Labour Court ordered a sum of €20,000.

What is very interesting about this case is that the Court has dealt with some depth with the issue of resignation and what might at first appear to be a constructive dismissal case can in fact become effectively a dismissal case.

Unfair Dismissal – Agency Workers

In the case of DHL Express (Ireland) Limited and Rachel Hickey the issue arose as to whether there had been a dismissal. The Court pointed out that in a case where there is an agency worker the hirer is responsible in an Unfair Dismissal case.

The Court in this case importantly pointed out;

"There is no provision in the Acts that support a contention that when an agency worker tells the agency that when he/she regards himself /herself as dismissed, the hirer should simply be deemed to have dismissed the worker concerned. Nor, indeed, should such a contention be supported by any logic. While, because of any potential legal liability under the Acts rests with the hirer, it might be desirable for the hirer to be made aware of any correspondence between an agency worker and the agency that relates to the employment relationship with the hirer. It simply cannot follow that, by itself, a declaration by the agency worker to the relevant agency that they deem themselves to have been dismissed means that the hirer is responsible for the Unfair Dismissal".

In this Case the Court pointed out that it was not necessary for it to consider the failure to provide the complainant with a return to work at a time when she sought it and had medical certification to support it amounted to constructive dismissal. Not alone was this not argued by the complainant her representative was emphatic that she did not

resign. That statement in itself calls into question that there could have been a dismissal as neither the agency nor the respondent hirer had taken any clear and active action to dismiss and the representative of the employee had contended she had not resigned. The Court held that the case was illogical and misconceived.

Unfair Dismissal and Redundancy

This issue arose in the case of a Senior HR Manager and a Global Management Company. ADJ-20023549.

The Adjudication Officer pointed out the case of JVC Europe Limited – v- Panisi 2011, IEHC 279 where Charleton J stated;

"In all cases of dismissal whether by reason of Redundancy or for substantial grounds justifying dismissal, the burden of proof rests on the employer to demonstrate that the termination of employment came within a lawful reason. In cases of misconduct, a fair procedure must be followed whereby an employee is given an entitlement to explain what otherwise might amount to a finding of real seriousness against his or her character".

In an Unfair Dismissal claim, where the answer is asserted to be redundancy, the employer bears the burden of establishing redundancy and of showing which kind of redundancy is apposite. Without that requirement vagueness would replace the precision necessary to ensure that upholding of employee rights. Redundancy is not personal. Instead, it must result from, as Section 7(2) of the Redundancy Payment Acts 1967, as amended, provides;

"Reason not related to the employee concerned."

"Redundancy cannot therefore be used as a cloak for the weeding out of those employees who are regarded as less competent than others or who appear to have health or age related issues. If that is the reason for letting the employee goes, then it is not a redundancy, but a dismissal".

The Adjudication Officer pointed out that Mr. Justice Charleton recited two specific legal requirements in effecting a legitimate redundancy both of which are directly relevant in the particular cases.

The first is Section 7(2) of the Act of 1967 where Section 5 (2) requires that "(2) for the purposes of subsection (1), an employee who is dismissed shall be taken to be dismissed by reason of redundancy if for one or more reasons not related to the employee concerned the dismissal is attributable wholly or mainly… five listed grounds. The Adjudication Officer pointed out that this highlights the essential requirement of impersonality in affecting a fair dismissal on grounds of redundancy noting the cases of St. Ledger –v- Front Line Distributors Ireland Limited 1995 E.L.R.160 at pages 161-162 where the EAT stated;

"Impersonality runs throughout the five definitions of the Act".

In this case Mr. Justice Charleton remarked that;

"It may be prudent and a mark of genuine redundancy that alternatives to letting an employee go should be examined" and that a fair selection procedure may indicate an honest approach to redundancy by an employer".

This case is useful in setting out the tests in relation to redundancy.

Selection for Redundancy

This issue arose in the case TUS Community Supervisor and a Local Development Company. Ref ADJ-00020033.

In this case the adjudication officer helpfully set out the relevant legislation being set out in Section 1, 6(1), 6(3), 6(4)(c), 6(7) of the Unfair Dismissal Acts. The other relevant section is Section 7(2) of the Redundancy Payment Acts, 1967-2014.

The Adjudication Officer set out the legislation in detail. When it came then to the issue of the selection of redundancy where it is accepted that the burden of proof is always on the employer the case of Boucher Irish Productivity Centre R92/1992 is relevant. In that case the EAT stated that the employer had to 'to establish that he acted fairly in the selection of each individual employee for redundancy and that where assessment are clearly involved and used as a means for selection that reasonable criteria are applied to all the employees

concerned and that any selection for redundancy of the individual employee in the context of such criteria is fairly made'.

The Adjudication Officer pointed out that generally selection criteria should not be based on subjective assessments of the employee. This is absolutely correct in our view. The employer must be able to establish as the Adjudication Officer set out that an employee was fairly selected for redundancy based on independent, objective and verifiable criteria. In essence what is required of the employer in this respect is to be able to objectively justified why a particular employee was selected for redundancy as opposed to another employee. Specifically the employer must be able to demonstrate that a particular employee had been compared to others who might have been made redundant. Where redundancy arises and no agreed procedure or custom is in place the reasonableness of the selection criteria is usually focused on and tends to be assessed by the objective standards of the way in which a reasonable employer in those circumstances in that line of business at that time would have behaved.

The Adjudication Officer pointed out the case of Bunyan -v- United Dominion Trust (Ireland) Limited 1982 ILRM404 where the EAT endorsed and applied the following view quoted from NC Watling Co Ltd -v- Richardson 1978 IRLR225 where it was stated.

''the fairness or unfairness of dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business, would have behaved. The Tribunal therefore does not decide the question whether, on the evidence before it, the employee should be dismissed. The decision to be dismissed has been taken, and our function is to test such decision against what we consider the reasonable employer would have done and/or concluded ''

In that case the employee won the case because it was able to be shown that the employee had been subjected to certain disciplinary matters. The case highlights the importance of the employer applying fair selection procedures.

Redundancy where payment is not made by the Department of Employment Affairs and Social Protection

This issue arose in ADJ-00021489. In that case the employee issued the claim but named the employer as the respondent. They did not name the department. The adjudication officer therefore dismissed the claim as the department had not been named.
It is vital in such cases where the department do not pay out that firstly they are notified of matters and secondly that after notifying them that they are named in the proceedings.

Redundancy

The right of an employee to claim a payment for a contract which is frustrated.

This issue arose in ADJ-00025512 involving a Chef and a Community Service Provider.

The Adjudication Officer set out Section 7 of the Redundancy Payment Acts in detail. The Adjudication Officer also set out the Provisions of Section 9. The relevant Section here is Section 9 (1) (c) where the employee terminates the contracts under which he is employed by the employer in circumstances … such that he is entitled so to terminate it by reason of the employer's conduct.

In this case the Adjudication Officer held that Subsection (c) allows for dismissal to take a place where the employee is allowed to terminate their own contract because of the conduct of the employer. The employee considered her new role and location to be unsuitable. The Respondent listened to those concerns and made a commitment that it would be considered. The employee it appears had not taken the opportunity for that consideration to take place. The Adjudication Officer stated they could not predict the outcome of that consideration but had no reason to doubt the Respondent employer would ensure it takes place when the Complainant returns from sick leave. The Adjudication Officer held that the employee had not been dismissed.

This case is useful for highlighting an issue relating to redundancy which is going to arise. There will times where an employee will rather claim redundancy rather than claim Constrictive Dismissal.

The provision of Section 9, in a particular Section 9 (1) (c) is an issue which employees will look to in the coming months.

The interesting aspect which was not addressed is whether the employee by their actions effectively resigned and whether the employer can now rely upon same.

Harassment in the Workplace.

This issue arose in case ADJ-00015922.

In this case the employee contended that the focus on these cases should be on the perception on the part of the harassed employee rather than the purported intent of the perpetrator or on the intentions of the employee and referred to the case of a Complaints -v- Contract Cleaning Company DEC-E2004-068 referred to at paragraph 12-56 of Employment Equality Law Bolger, Bruton, Kimber Dublin 2012. It was submitted that it was no defence on the part of the employer to say the employee admitted carrying out a very serious incident of sexual harassment but that the employee in question did not mean to cause offence. It was further submitted that an ineffectual response on the part of an employer which does not adequately address the matter can give rise to a finding of discrimination against the employer and relied on the case of Odion -v- Techniform (Waterford) Limited again discussed in Employment Equality Law Paragraph 12-62.

The Adjudication Officer looked at the provisions of Section 14 A of the Acts and in particular whether the respondent took reasonable action to prevent the harassment or sexual harassment accruing in the workplace. This includes considering the extent of which an employer was aware of the experiences of an employee to enable it to deal with the complaint. The issue is whether it took reasonable action to enable it to rely on the defence in Section 14 A (2) of the act. The employee in this case contended that the harassment and sexual harassment took the form of persistent comments on her appearance,

her relationship status and been shown suggestive and explicit material. There were also "requests".

The Adjudication Officer set out that Section 14 A (2) of the Act provides that it is a defence for an employer to show that it took such steps as are reasonably practical to prevent sexual harassment and harassment from occurring in the first place and in circumstances where such harassment has occurred that it took actions to reverse its effect. The Adjudication Officer pointed out that the Labour Court had previously held that in order for an employer to avail of the first component of this defence it must show at a minimum that a clear anti-harassment or dignity at work policy was in place before the harassment or sexual harassment occurred and that the policy was effectively communicated to staff and quoted the case of a Hotel -v- Worker EDA0915 where the Labour Court held
''…an employer must be conscious of the possibility of sexual harassment occurring and have in place reasonable measures to prevent its occurrence as well as policies and procedures to deal with such harassment where it is found to have taken place. This requires the employer to show, at a minimum, that a clear anti-harassment or dignity at work policy was in place before the harassment occurred and that the policy was effectively communicated to all employees''

In this case the Adjudication Officer held that the employer could not avail of the defence.

In this case an issue was that the company was providing security on two sides and there was no evidence tendered that the perpetrator was considered to be moved to another site in response to the situation. In this case the sum of €15,000 was awarded.

This case is a reminder for employers that where there is a claim of harassment or sexual harassment an employer must investigate same. They then must take appropriate steps in relation to matters to mitigate the chances of same occurring into the future. The intention of the perpetrator is irrelevant.

This is a useful case for anybody to read.

Holiday Pay

This issue arose in a case of a Journalist and a Media Company ADJ-00022855. The employee had been described as a self-employed individual but the matter went to SCOPE which determined that she was an employee.

The employer in this case contended that the compensation for annual leave was already included in the shift allowances paid to the employee and that equivalent staff retained on a lower wage than that which was paid to the employee in question and that effectively her full holiday entitlement had been covered by the enhanced shift allowance. The Adjudication Officer pointed out that this was not reflected in the terms of the contract. The Adjudication Officer pointed out that employee must be paid her normal weekly wage while on annual leave. Helpfully the Adjudication Officer pointed out that the Labour Court had previously ruled that a weekly allowance cannot be paid to an employee in lieu of statutory entitlements being the case of Mikoian -v- Motovilova DWT 54/2007.

Payment of Wages Act 1991

An interesting case is that of Edmund Lavin Services Limited and Mallachy McDonnell under ref PW/19/89.

There is a couple of issues which are relevant in this case. The first is that this related to a claim under the Sectoral Employment Order for the Construction Industry. The case was heard by the Labour Court under the Payment of Wages Act 1991. While no argument was raised by either party as to the jurisdiction of the Labour Court to hear the case the Labour Court traditionally and in virtually every case will determine themselves often before the case comes on for hearing whether there is a jurisdiction issue. Clearly the Court in this case would have believed that there was none. The reason that this has been raised is that some Adjudication Officers have held that where a claim has been brought under a Sectoral Employment Order it cannot be brought under the Payment of Wages Act, 1991. Clearly this is a case where the Labour Court though they did not mention it, have effectively found that that is not the position and that a claim for

underpayment under a Sectoral Employment Order can be brought under the Payment of Wages Act, 1991.

The Court in particular set out the provisions of Section 5 of the Act.

This case related to the SEO for the Construction Industry SI455/2007 which came into effect on 1 October 2007. In this case the relevant order made no provision as to what normal working hours were and no provision for overtime. It did make a provision for unsocial hour payments. The Labour Court in this case held that the employee was working one hour extra per week. The Labour Court treated this as a deficiency or non-payment of €8.52 per week and awarded a sum of €161.88.

What is interesting in this case is that the Labour Court has held that working was an unsocial payment provision.

We do not believe that this is a precedent for the idea that anybody working one hour extra a week will have worked unsocial hours. The relevant SEO had a deficiency in it and this was a novel way of the Labour Court resolving that problem.

Payment of Wages Act 1991 – Training Rates

This issue arose in a case of Coyne Tyres Ballina Limited and Alan Sweeney PW-19-86.

The employee in this case worked as a mobile tyre fitter for approximately 1 month. The employee was paid €7.16 per hour. During the relevant period the National Minimum Wage was €9.55 per hour.

The employer in this case contended that the employee was on a three month training period.

What is interesting is the conclusion in which the Labour Court set out.

The Court referred to S.I. 99/2000 being the Prescribed Courses of Study or Training Regulations 2000.

The Court referred to same and importantly stated;

"The statutory provisions also include workplace training, which means planned and structured training carried out under normal operational job pressures and can be delivered inside or outside of the workplace. The course must be the subject of a pre-existing written document or documents detailing inter-alia, its objectives, outlined plan of duration and approach, a record system and assessment and certification procedures".

The Court held in this case that no documentation or evidence of a training programme as described was presented to the Court. The Court held that the employee was entitled to the amount claimed.

Again, there is an interesting aspect in relation to this that this case was taken under the Payment of Wages Act not the Minimum Wage Act. An employee cannot be paid less than the National Minimum Wage. Therefore, if an employee is being paid less they can in certain circumstances, rather than them bringing a National Minimum Wage claim, bring a claim under the Payment of Wages Act.

While it is not part of this case that was heard by the Labour Court, a claim under the Payment of Wages Act is limited to six months from the date the claim is lodged back. In a situation where you have a claim under the National Minimum Wage Act the employee can go back six years.

Protection of Employees (Fixed-Term Work) Act 2003

In case ADJ-00019988 the issue arose in relation to an employee reverting to a previous position.

The employee in this case was a permanent employee of the respondent. The employee had been appointed as an interim CEO and extended on a number of occasions. The adjudication officer referred to the case of Cork County Council -v- Sheehan FTD193 where the Court stated

"It is not in dispute that the claimant was engaged on a permanent contract, that her permanent status continued since she took up employment with the respondent and that she reverted to her

substantive grade as a permanent employee upon the cessation of her acting assignment. The only issue for consideration, therefore, is whether she enjoyed a contract (fixed-term) within or a contract (permanent). It seems to the Court that if it was intended to provide for such within the Act this would have (and would need to have) been set out explicitly within the said Act."

The Adjudication Officer pointed out that the Court went on to state

"These cases are not uncommon, but the position of the Court has been clear, consistent, and entirely in keeping with the logic of the legislation so that the purpose of the Act is to offer certain protections to fixed-term workers who, by nature of their status, could otherwise be treated less favourably than permanent employees. It is not the purpose of the Act to offer additional protections to permanent employees in respect of temporary arrangements within their contracts of permanency."

The employee lost this case.

There is no doubt that the Irish legislation, as drafted does not provide a protection for those who are in acting up positions.

European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S. I. No 131 of 2003)

In case ADJ00025471 involving a bus driver and a bus company, the Adjudication Officer held that there had been transfer.

The employee brought the claim against the transferor. This was the company that the bus driver originally worked for. There had been no consultation prior to the transfer. The Adjudication Officer reviewed the legislation in some depth. The Irish legislation provides that the all the obligations and liabilities move from the transferor *(the original employer) to the transferee (the new employer). In those circumstances, the claim must be brought against the transferee (the new employer. The fact that the complaint is that the original employer did not consult with the employee is irrelevant. The claim is brought against the new employer for the old employer not complying with their obligations. This may sound strange. It is. The Directive allows for a situation where a claim could be brought against both, the original employer and the new employer but that has to be elected

for. When our legislation was put in place, that was not done. Therefore, the only claim could be brought was against the new employer.

Accordingly, in this case, the claim was dismissed.

Appeal of Compliance Notice

This issue arose in the case of Boots Retail (Ireland) Limited and the Workplace Relations Commission CNN194.

The appeal was brought on behalf of Boots Retail (Ireland) Limited. The appeal was made under Section 28 (7) of the Workplace Relations Act 2015 against a compliance notice.

Section 28 of the Act is relevant. It determines that where an inspector is satisfied that an employer has, in relation to any of his or her employees, contravened a provision to which the section applies, the inspector may serve a notice (in this section referred to as a "compliance notice") on the employer.

Section 28 (17) states that Section 28 applies to those provisions specified in Column 3 of Schedule 4 of the 2015 Act. The provisions in question include under the Working Time Act Section 6(2), 11, 12, 13, 14 (1), 15 (1), 16(2), 17, 18, 19 (1), 19(1a), 21, 22 and 23 (1) & (2).

The compliance notice also alleged that the issue which in this case related to breaches of Section 12 of the 1997 Act being rest breaks added in the words

"Contrary to the provisions of the Organisation of Working Time (Breaks at Work for Shop Employees) Regulations 1998 SI 57/1998…"

The inspector formed the opinion that there was breaches of the 1997 Act and SI57/1998.
The Court pointed out that Section 28 (10) of the 2015 Act provides that the Labour Court on appeal can do one of the following:

(A) Affirm the compliance notice;
(B) Withdraw the compliance notice concerned;
(C) Withdraw the compliance notice and require the employer to whom

the notice applies to comply with such directions as may be given by the Labour Court.

The Court noted that concerns related to the inclusion of alleged breaches of SI57/1998. That statutory instrument is not an enactment specified in Column 3 of Schedule 4 of the 2015 Act. The Court pointed out that it was not open to the Court to infer or imply inclusion of a Statutory Instrument into the Schedule simply on grounds of the legislative basis for that statutory instrument having issued.

The Court pointed out in no uncertain terms that it does not have the power to "blue pencil" a compliance notice and that it did not have the power to amend or otherwise rewrite any compliance notice.

The Court held that the relevant compliance notice was defective and directed that it be withdrawn.

The decision of the Labour Court makes perfect sense. The Labour Court has its jurisdiction from what is set out in the 2015 Act.

The issue in relation to the 2015 Act is that this Act is consistently being commented upon, though not by the Labour Court in this case, as effectively being defective. There has been extremely poor drafting of this piece of legislation. This is another prime example of defective drafting. It would have been a very simple matter to include the relevant Statutory Instrument. The Statutory Instrument relates to shop workers. Therefore as the law currently stands an inspector of the WRC, cannot issue a compliance notice for breach of the break periods relating to shop workers where there are more beneficial provisions than those set out in the Organisation of Working Time Act. This is and we use the word on purpose a further example of quite appalling negligence in the drafting of legislation. We have the appalling situation of poorly drafted legislation where the government of the day was not prepared to invest in putting in place codified legislation. The Workplace Relations Act, 2015 is a mismatch of bits of legislation dragged together in a substandard fashion. The effect of the legislation is that the WRC inspectors have no power in relation to the relevant Statutory Instrument. They can do nothing about it. They cannot issue a compliance notice.

The sad reality is that there is no agenda there by either the Department of Employment Affairs and Social Security or the Department of Business Enterprise and Innovation to put the funds in place to put in place proper codification and modernisation of our employment legislation. It will be interesting to see if this blatant defect in the legislation will be dealt with by way of any form of amending legislation.

Taking the way both of these Departments work it's probable that this will not be regarded as anything urgent. Knowing the two Departments it is unlikely that they will even comprehend the effect of what this decision of the Labour Court is which has significant implications for enforcement of the legislation in respect of shop workers and their break entitlements.

Returning to work after an accident – Can an employee seek "lighter duties"

An Employee suffers an accident. The employee is certified fit to return to work but on lighter duties. What are the rights and obligations of the employer and the employee?

It may often happen that an employee will be involved in an accident. It may be an accident in the workplace or it may be an accident outside of the workplace. The employee then comes to the employer with a certificate, from their GP stating that they are fit to return to work but only to undertake lighter duties.

The employer in these situations can be met with a number of situations that they need to consider.

1. Should they be asking the employee to continue to put in sick certificates until they are in a position to return to their normal duties;
2. The employer is unable to provide lighter duties; or
3. The employer is reluctant to have the employee come back on lighter duties.

This raises a number of questions and the first one is
1. Is an employer obliged to provide an employee with lighter duties

The issue as to whether the employee is suffering from a disability under the Employment Equality Acts is often overlooked by employers. In Leydon –v- Customer Perceptions Limited DEE17/2003 the employee had suffered an injury in a road traffic accident.

The Labour Court in that case held that the employee was not suffering merely from a temporary minor condition. The Labour Court looked at the issue of the ordinary and natural meaning of the word "malfunction" used under the Act and held that the employee came within the scope of the protection of the Act.

So what does this mean in practice?

In reality it means that the legislation requires an employer to make appropriate enquiries as to the extent of the employee's injuries. The employer must consider any special measures which could be put in place to reasonably accommodate the employee. Where the employee is not fully capable of doing the job they were employed to do even with reasonable accomodation the employer is not obliged to retain that employee. Now it is quite clear in those circumstances the employer does not have to provide lighter duties and can require the employee to continue sending in certificates until they are fit to return to their normal duties.

The problem arises however where the employer considers dismissing the employee. If the employer does not carry out the proper enquiries then the employer runs the risk that the employee may well win a discrimination case on the disability grounds.

Section 16 (3) of the Employment Equality Act sets out the requirements for an employer to provide reasonable accomodation. This issue arose recently in the case of Nano Nagle –v- Daly 2019 IESC63 which approved the test which an employer should use in accessing reasonable accomodation. That is the test that was set out inHumphreys –v- Westwood Fitness Club 2004 ELR296. There are three conditions namely;

1. The employer must examine the factual position and seek clear medical guidance regarding the employee's capability. This includes the degree of impairment arising from the disability and its likely duration;

2. The employer must consider what reasonable accomodation or appropriate measures can be made available by which the employee may become fully competent to perform his or her role; and

3. Consult with the employee along the way to ensure that the employee has a say in any decision which could impact in a negative way on their terms and conditions of employment or which could lead to the termination of the employment.

It is advisable that the employee is encouraged to participate in the process from the outset. The Supreme Court in the Nano Nagle case found that while consultation is not mandatory and does not itself constitute discrimination that a prudent employer will provide "meaningful participation", in effect to show vindication of the employers duty under the Act.

Must the employer provide an entirely different job. The decision in the Nano Nagle case is that it is quite clear there is no obligation on an employer to provide a completely different job. Therefore if you had an employee who was working as a general operative on the factory floor there is no requirement to give the employee a job of an administrative nature.

Where an employer cannot reasonable accommodate an employee returning then the employer can insist on sick certificates to cover absences until they are fit to return to their normal duty.

It is best practice to have the employee reviewed by an occupational health advisor. This is particularly so if any issue of dismissal may subsequently arise.

An employer who has an employee who is not fit to do the work they were engaged to do may ultimately dismiss the employee. However, it is important that employers are extremely careful before going down that route as until they can show that they dealt with the issue of looking at reasonable accomodation the employer can find themselves of the wrong side of an equality claim.

What forms part of a Personal Injury Claim?

We are often asked questions such as what is included in the value of a personal injury claim, what legal fees will I have to pay, can I include my medical expenses? We thought it would be useful to give some simple answers to these important questions.

General Damages
General damages is the legal term for compensation for your pain and suffering. The amount of money you are awarded for your compensation will depend on the contents of the medical report from your doctor. The value will be based on the type of injury you have suffered, how long the injury lasted, whether or not you have made a full recovery and the treatment you have received.

Special Damages
Special damages is the legal term for your out of pocket expenses. These will include doctors' consultation fees, fees for scans/xrays, pharmacy expenses, physiotherapy expenses, travel expenses, damage to a motor vehicle and any other expenses paid by you. In cases involving very serious injuries, the special damages claim may also include a claim for future out of pocket expenses, e.g. the future cost of medical treatment. It is important that you retain all bills/invoices/receipts and give them to your solicitor so that all expenses can be included in your claim.

Loss of earnings
If you have lost wages/earnings because of injuries suffered in an accident, this loss can also be included in your personal injuries claim. More serious personal injury claims with serious injuries can include a claim for future lost wages/lost earnings or loss of future employment opportunity. There are various expert reports which are needed to support this aspect of your personal injuries claim and we will advise you, if they are required.

Legal costs
Legal costs are not included in a claim which has been assessed by the Personal Injuries Assessment Board (PIAB). This means that you

will be responsible for the discharge of your legal costs. When a case proceeds to court, a lot of your legal costs will be recovered from the party at fault for your injury, if you are successful with your case. Again, the legal costs associated with investigating the case and dealing with the PIAB stage will not be recoverable from the party at fault for your injuries, even if you are successful with the case. Accordingly, it will be necessary for you to pay for this small part of your legal costs. Before any case is taken, we will discuss with you what the likely fees will be or how they will be calculated. We never charge percentage fees. This is illegal.

The Personal Injuries Assessment Board – How does it work?

The Personal Injuries Assessment Board, also known as PIAB and/or the Injuries Board, is an independent state body which was established by the Personal Injuries Assessment Board Act 2003 to assess personal injuries compensation in Ireland. All claims for personal injuries, with the exception of medical negligence cases, must first be submitted to PIAB before going to court. This is the law.

A claim for compensation for injuries and losses must be submitted to PIAB within a period of 2 years less 1 day from the date on which the accident happened or within a period of 2 years less 1 day from the date of knowledge of the injury. The application to PIAB will consist of a completed application form, which can be found on www.piab.ie, and a medical legal report from a doctor which sets out the injuries, the treatment received and a prognosis in relation to the injury. Submitting the application by post or email will incur a cost of €90.00. However, submitting the application using the online application procedure will incur a reduced cost of €45.00. A medical report from a doctor will cost in the region of €300.00 – €700.00, depending on the area of specialism.

Once the application has been acknowledged as received and complete by PIAB, the time afforded to a person under Irish law within which to bring a claim for personal injuries will stop running. The person bringing the claim for compensation will be known as the claimant in the PIAB process. Upon receipt of the application, PIAB will send a copy of the application form and the medical report to the party at fault for the injuries. The person at fault for the injuries will be called the respondent during this process. The respondent will be given a

period of 90 days within which to consent or reject to PIAB dealing with the matter. If the respondent consents to PIAB dealing with the matter, he/she/it must respond within the 90 day period and pay the processing fee, as set out in the formal notice received. If the respondent does not consent to PIAB dealing with the matter or does not simply respond to PIAB or pay the fee, PIAB will issue a document called an authorisation which will allow the person claiming compensation for injuries to progress the claim through the courts system.

If responsibility for the accident is not in dispute, the matter will usually stay with PIAB for a period of 9 months from the date of receipt of consent by the respondent. This period of time can be extended by PIAB, if required. During this period, PIAB will arrange for the person claiming compensation for the injury to be medically assessed by an independent medical expert. In addition, the person bringing the claim will also have to submit details of any out of pocket expenses, e.g. medical expenses, pharmacy expenses, etc., and loss of earnings to PIAB.

At the end of the time period, PIAB will then write to the person claiming compensation for the injuries and his/her solicitor setting out details of the assessment. The assessment is the breakdown of the compensation determined by PIAB as being appropriate for the injuries and financial losses. This will be based upon the medical evidence and vouched expenses / losses submitted to them. The assessment will usually consist of the following: –

General Damages: This is the legal term given to compensation for pain and suffering;

Special Damages: This is the legal term given to out of pocket expenses, e.g. medical expenses, physiotherapy costs, pharmacy expenses, travel expenses, etc.

Loss of earnings: This will consist of any certified lost income for the period of absence from work due to injuries suffered in the accident less any social welfare benefits received during this time.

Legal Costs: PIAB will not pay legal costs so this is a matter which you should discuss with your solicitor. However, PIAB will allow for the cost of the medical report and PIAB application fee.

When the PIAB assessment is received, the person claiming compensation for the injury will have a period of 28 days within which to accept the assessment. If the acceptance is not communicated to PIAB within the 28 day period, the person claiming compensation will be deemed to have rejected the PIAB assessment. The respondent will have a period of 21 days within which to accept or reject the PIAB assessment.

If both parties accept the PIAB assessment, PIAB will issue an Order to Pay and serve it on the respondent. The Order to Pay will have the same effect as a court order. Once this is served, the respondent will usually arrange for payment of the assessment within a period of 3 – 6 weeks. The claim is then finished and closed.

If the PIAB assessment is rejected by either party, PIAB will issue a document called an authorisation. This document will allow a person claiming compensation for injuries and losses to progress the claim through the courts system. It will be necessary to brief a barrister at this stage of the process and your solicitor will explain all of these details to you.

The person claiming compensation for injuries and losses must give careful consideration before deciding to reject a PIAB assessment as there will be risks associated with proceeding to court. If a PIAB assessment has been rejected by the person making the claim but accepted by the respondent, then the person bringing the claim must obtain a higher award in court. If they fail to do so, then one of the following two scenarios can occur:

No award of legal costs may be made to the claimant;

The court may exercise it's discretion to award legal costs against the claimant.

The above could result in a claimant receiving far less compensation than the PIAB assessment or nothing at all. This is why it is important to speak to your solicitor about any PIAB assessment.

There will be certain scenarios where PIAB will use it's discretion not to assess a personal injuries claim. The most common scenarios will be cases involving psychological or psychiatric injury or cases where the interaction of other injuries makes an assessment too complex. If you would like to speak with us in relation to a claim for personal injuries, contact us today. While we are based in Dublin, we do offer a nationwide service and do our best to ensure that as much work as possible is carried out by telephone, email and post.

***Before acting or refraining from acting on anything in this Newsletter, legal advice should be sought from a solicitor.**
****In contentious cases, a solicitor may not charge fees or expenses as a portion or percentage of any award of settlement.**